

**Staff
Summary
Report**



To: Mayor & City Council
Through: City Manager

Agenda Item Number _____
Meeting Date 9/05/02

SUBJECT: Approval of an agreement with the Arizona Board of Regents for and on behalf of Arizona State University – Herberger College of Fine Arts for the use of Gammage Auditorium rehearsal halls for September 5, 2002 – April 7, 2003.

PREPARED BY: Adrienne Richwine, Cultural Services Supervisor, 480/350-5237

REVIEWED BY: Jody Ulich, Cultural Services Director, 480/350-5320
Tom Canasi, Community Services Manager, 480/350-5305

LEGAL REVIEW BY: Ron Dunham, Assistant City Attorney, 480/350-8814

BRIEF: Request approval to enter into an agreement with the Arizona Board of Regents for and on behalf of Arizona State University – Herberger College of Fine Arts for the use of Gammage Auditorium rehearsal halls for September 5, 2002 – April 7, 2003.

COMMENTS: **ARIZONA STATE UNIVERSITY (0109-02)** Request approval to enter into an agreement with the Arizona Board of Regents for and on behalf of Arizona State University – Herberger College of Fine Arts for the use of Gammage Auditorium rehearsal halls for September 5, 2002 – April 7, 2003. Rehearsals will be held on selected Mondays and Thursdays during the course of the agreement period between the hours of 6:30 and 10:00 p.m. Terms and conditions of use are per the agreement with the Board.

Document Name: (20020905csju01) Supporting Documents: yes

SUMMARY: It is the desire of the Community Services Department / Cultural Services Division to enter into an agreement with the Arizona Board of Regents to use the Gammage Auditorium rehearsal halls for the purposes of facilitating practices of the Tempe Symphony Orchestra during the 2002/2003 season.

FISCAL NOTE: There is no cost to the City for the permitted use of the facility.

RECOMMENDATION: Staff recommends approval of the agreement and that City Council authorizes the Mayor to sign the agreement on behalf of the City.

OFF-CAMPUS FACILITIES USE AGREEMENT

**Katherine K. Herberger College of Fine Arts
Arizona State University**

This Off-Campus Facilities Use Agreement is entered into as of **JUNE 10, 2002** (the Effective Date), between the ARIZONA BOARD OF REGENTS for and on behalf of ARIZONA STATE UNIVERSITY (UNIVERSITY) and, **CITY OF TEMPE/TEMPE SYMPHONY ORCHESTRA C/O RICHARD STRANGE** (USER) for the use by USER of certain Space or Facilities owned by UNIVERSITY and managed by the School of Music (SOM).

1. **Space.** Subject to the terms of this Agreement, UNIVERSITY agrees that USER may use the following Space or Space and equipment at SOM facilities:
ASU SCHOOL OF MUSIC REHEARSAL HALLS IN GAMMAGE AUDITORIUM

2. **Use.** USER may use the Space for the following, and for no other purpose:
TEMPE SYMPHONY ORCHESTRA REHEARSALS

3. **Date and Time.** USER may use the Space on the following dates and during the following hours:
SELECTED MONDAYS AND THURSDAYS FROM SEPTEMBER 5, 2002 TO APRIL 7, 2003, 6:30 TO 10:00 P.M.

- a) When using the Space, USER agrees to comply with all related state, federal, or city laws and regulations, and with the policies and regulations of the UNIVERSITY pertaining to the use and occupancy of the Space.
- b) USER agrees to take good care of the Space and to maintain the space in as good order and condition as it was prior to USER'S use.
- c). USER agrees not to use or allow the Space to be used for any unlawful purpose. USER agrees not to commit or allow to be committed any waste or nuisance in or about the Space, or subject the Space to any use that would damage the Space or raise or violate any insurance coverage maintained by the University.
- d). USER shall not permit any food or drink, music or sound equipment on the Space without the prior written consent of UNIVERSITY. All food must be purchased from the approved Catering list. If alcohol is to be served, an alcohol permit must be submitted for approval to the Herberger College of Fine Arts' Dean's Office. Final review will be by the Department of Public Safety. This request must be submitted at least 30 days prior to the scheduled event.
- e). When using the Space, it is agreed that

- 1). USER shall take the premises as-is, any pre-existing conditions noted by USER must be presented in written form and approved by the Building Manager's signature.
 - 2). USER has the right to have a representative on site to verify actual damages.
 - 3). USER shall be responsible for the payment of any and all damages to the building, furnishings, fixtures, or equipment whether caused by USER or his patrons; normal wear and tear excluded.
 - 4). ASU SOM assumes no responsibility for any property placed in the facility by the USER.
4. **Services Provided.** SOM will provide, as part of the base rental charge, at its own expense: four walls; heating/air conditioning; house lights. All other expenses incurred by SOM will be billed to the USER according to the attached Schedule of Costs (Schedule A).
5. **Staffing.** SOM shall secure and the USER shall pay for all necessary staffing. SOM staff retains the right to determine the appropriate number of security, medical, PTS, DPS, stagehands, staff and front of house personnel necessary to execute the event and properly serve and protect the public. A Schedule of Estimated Costs is included. (Schedule B).
6. **Control of the Building.** The Space shall be at all times under the control of the Building Manager or authorized designate. The Building Manager has the complete authority to authorize SOM employees and other designated UNIVERSITY employees and agents to enter the premises at any time. Persons will not be permitted inside the Space in excess of the established capacity. The established capacity of the Space is 125 patrons less any required space for technical personnel.
7. **Term.** The term of this Agreement will begin on the Effective Date and end on, **APRIL 7, 2003, 10:00 P.M.**, at which time USER'S right to use the Space under this Agreement will automatically expire. Either party upon ten (10) days prior written notice to the other party, may terminate this Agreement.
8. **Fee.** USER agrees to pay UNIVERSITY a use fee of \$ **WAIVED** per this event (e.g. month, year, week) whether or not USER actually uses the Space unless the Agreement has been cancelled within the designated time period in paragraph 7. Reimbursement of direct costs incurred by the SOM will be based on the Schedules of Cost (both A and B) as detailed in paragraphs 4 and 5 of the Agreement. The first installment shall be payable in advance on or before the Effective Date. All subsequent payment shall be payable in advance on or before (e.g. first of the month). USER also shall pay when due all taxes if any, levied or assessed against UNIVERSITY by reason of this Agreement or USER'S use of the Space (other than UNIVERSITY'S income taxes).
9. **Insurance.** USER, at its expense, agrees to procure and maintain during the term a policy of commercial general liability insurance in an amount of not less than one million dollars (\$1,000,000), single limit, against claims for bodily injury, death and property damage occurring in connection with USER'S use of the Space. This insurance must name the Arizona Board of Regents, Arizona State University, and the State of Arizona as additional insureds. USER must provide UNIVERSITY with a certificate evidencing this insurance coverage or self insurance coverage no later than twenty-one days prior to USER'S use of the Space. University acknowledges that user, City of Tempe, is self insured and that user's self insurance program meets the insurance requirements of this provision.

10. Liability. USER agrees to conduct its activities in the Space in a careful and safe manner. As a material part of the consideration to UNIVERSITY, USER agrees to assume all risk of damage to and loss or theft of USER'S property while at UNIVERSITY, damage to the Space, and injury or death to persons related to USER'S use or occupancy of the Space in upon, or about the Space from any cause, and USER waives all claims against UNIVERSITY. USER further agrees to indemnify and hold harmless Arizona State University, the Arizona Board of Regents, the State of Arizona and their officers, regents, agents and employees, against all claims, suits, liabilities, costs, damages and expenses (including reasonable attorney's fees) arising out of or in connection with: (i) USER'S use or occupancy of the Space, or any activity or thing done, performed or suffered by USER, its agents, its employees, licensees, invitees or persons attending or participating in USER'S activities in or about the Space; or (ii) any loss, injury, death or damage to persons or the Space on or about the Space by reason of any act, omission or negligence of Licensee, or any of its agents, its contractors, its employees, licensees, or invitees; or (iii) any breach or default in the performance of any obligation on USER'S part to be performed under the terms of this Agreement. USER'S indemnity obligations will not extend to any liability to the extent caused by the negligence of UNIVERSITY or its agents or employees.

11. Environmental Regulations. USER will not permit any Hazardous Substance to be used, stored, generated or disposed of on, in or about, or transported to or from, the Space, by USER, USER'S agents, employees, contractors, invitees, subtenants, concessionaires or licensees without first obtaining UNIVERSITY'S written consent, which UNIVERSITY may give or withhold in its sole discretion, or revoke at any time. If UNIVERSITY consents, all Hazardous Substances must be handled at USER'S sole cost and expense, in compliance with all applicable state, federal or local governmental requirements, using all necessary and appropriate precautions. If USER breaches these obligations, or if the presence of Hazardous Substances on, in or about the Space caused or permitted by USER results in contamination of any part of the Space, or if contamination by Hazardous Substances otherwise occurs in a manner for which USER is legally liable, then USER will indemnify and hold harmless Arizona State University, the Arizona Board of Regents, and the State of Arizona from and against any and all claims, actions, damages, fines, judgments, penalties, costs, liabilities, losses and expenses (including, without limitation, any sums paid for settlement of claims, court costs, attorneys' fees, consultant and expert fees) arising during or after the expiration or termination of this Agreement as a result of any breach or contamination. Without limitation, if USER causes or permits the presence of any Hazardous Substance on, in or about the Space and this results in contamination of any part of the Space, USER will promptly, at its sole cost and expense, take all necessary actions to return the Space and any adjacent facility to the condition existing prior to the presence of any Hazardous Substance; provided, however, USER shall first obtain UNIVERSITY'S approval for any such remedial action. Hazardous Substance means any substance regulated by any local government, the State of Arizona or the United States government. Hazardous Substance includes any material or substances which are defined as hazardous material, hazardous waste, extremely hazardous waste or a hazardous substance pursuant to state, federal or local government law. Hazardous Substance includes but is not restricted to asbestos, polychlorobiphenyls and petroleum.

12. Assignment and Subletting. USER does not have the right to assign this Agreement or allow any other person or entity to use or occupy any of the Space without the

prior written consent of UNIVERSITY/SOM, which consent may be granted or withheld in UNIVERSITY/SOM'S sole discretion.

13. Default. If USER fails to pay any fee or other sum required to be paid by USER when due, or otherwise fails to comply with or observe any other provision of this Agreement, in addition to any other remedy that may be available to UNIVERSITY, whether at law or in equity, UNIVERSITY may immediately terminate this Agreement and all rights of USER.

14. Interpretation. This Agreement constitutes the entire agreement and understanding of the parties with respect to its subject matter. No prior or contemporaneous agreement or understanding will be effective. This Agreement may not be modified or amended except by written instrument signed by both parties. This Agreement shall be governed by the laws of Arizona, the courts of which state shall have jurisdiction over its subject matter.

15. Relationship. Neither USER nor any personnel of USER will for any purpose be considered employees or agents of University. USER assumes full responsibility for the actions of USER'S personnel, and is solely responsible for their supervision, daily direction and control, payment of salary (including withholding income taxes and social security), worker's compensation and disability benefits.

16. Authority. The individual signing below on behalf of USER hereby represents and warrants that s/he is duly authorized to execute and deliver this Agreement on behalf of USER and that this Agreement is binding upon USER in accordance with its terms.

17. Arizona State Agency Provisions

a). **Nondiscrimination.** The parties agree to comply with all applicable state and federal laws, rules, regulations and executive orders governing equal employment opportunity, immigration, nondiscrimination, including the Americans with Disabilities Act, and affirmative action.

b). **Conflict of Interest.** This Agreement is subject to Section 38-511, Arizona Revised Statutes. This Agreement may be canceled if any person significantly involved in initiating, negotiating, securing, drafting or creating this Agreement on behalf of UNIVERSITY is an employee, consultant, or agent of any other party to this Agreement.

c). **Arbitration.** Notice is provided of Sections 12-1518 and 12-133, Arizona Revised Statutes.

d). **Failure of Legislature to appropriate.** If UNIVERSITY'S performance under this Agreement depends upon the appropriation of funds by the Arizona Legislature, and if the Legislature fails to appropriate the funds necessary for performance, then UNIVERSITY may provide written notice of this to USER and cancel this Agreement without further obligation of UNIVERSITY. Appropriation is a legislative act and is beyond the control of UNIVERSITY.

e). To the extent required by Section 35-214, Arizona Revised Statutes, USER agrees to retain all records relating to this Agreement.

For SCHOOL OF MUSIC APPROVAL

Signature _____

Name: Wayne Bailey, Director

For UNIVERSITY APPROVAL

Signature _____

Name: J. Robert Wills, Dean

Arizona State University
Katherine K. Herberger College of Fine Arts
P. O. Box 872102
Tempe, AZ 85287-2102

USER

Signature _____

Name: _____

Title: _____

Company Name: _____

Address: _____

Date: _____

Schedule A – Schedule of Costs for off-campus events

1. Facility rental fee.
2. Technical personnel required to operate the facility: lighting & audio technicians; stage & house managers. Charges are based on \$12.00 per hour per worker, at a four-hour minimum, and pro-rated thereafter.
3. Piano tuning: \$75.00 each piano.
4. Cleanup after reception: \$150.00; waived if USER provides satisfactory cleanup.
5. Miscellaneous charges based on requirements of the event.
6. Facility Use Fee: \$48.00
7. University Business Service Charge: 6.32% of items 2-6.

Schedule B – Estimate of Costs for this event

1.	\$Waived	– Facility rental fee
2.	\$ N/A	– Technical personnel
3.	\$ N/A	– Piano Tuning
4.	\$ N/A	– Cleanup after reception
5.	\$ N/A	– Miscellaneous charges
6.	\$ N/A	– Facility Use Fee
7.	\$ N/A	– University Business Service Charge (6.32% X \$)
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	\$ 0.00	– Total